Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CITY OF HAMILTON, OHIO;
TRANSIT MANAGEMENT OF HAMILTON, INC.,
Petitioners,

v.

AMALGAMATED TRANSIT UNION LOCAL 738,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision of the Ohio Supreme Court in *City of Hamilton v. State of Ohio Employment Relations Board*, 70 Ohio St. 3d 210, 638 N.E.2d 522 (1994), impermissibly interferes with federal labor law in regard to the jurisdiction of the National Labor Relations Board over the employees of a private employer as set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and *Garner v. Teamsters Local Union*, 346 U.S. 484 (1953).

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Ohio are the City of Hamilton, Ohio, Transit Management of Hamilton, Inc.,[1] and the Amalgamated Transit Union Local 738.

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[1] In response to Rule 29.1, Petitioner, Transit Management of Hamilton, Inc. ("TMH"), states that it is a subsidiary of ATE Management & Service Co. Inc., which is a subsidiary of Ryder Truck Rental, Inc., which is a subsidiary of Ryder System, Inc. Petitioner TMH further states that TMH has no subsidiaries.

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NO. _____

IN THE
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CITY OF HAMILTON, OHIO;
TRANSIT MANAGEMENT OF HAMILTON, INC.,
Petitioners,

v.

AMALGAMATED TRANSMIT UNION LOCAL 738,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners City of Hamilton, Ohio and Transit Management of Ohio, Inc. respectfully request that a writ of certiorari be granted to review the judgment of the Supreme Court of Ohio entered in this case on September 14, 1994, reported as *City of Hamilton v. State of Ohio Employment Relations Board*, 70 Ohio St. 3d 210, 638 N.E.2d 522 (1994).

OPINIONS BELOW

The decision of the State of Ohio Employment Relations Board appears in the Appendix [A19].[2] The decision of the Franklin County Court of Appeals is reported at 1993 Ohio App. LEXIS 1742 (Ohio Ct. App. Mar. 23, 1993) [A13]. The decision of the majority of the Supreme Court of Ohio is reported at 70 Ohio St. 3d 210, 638 N.E.2d 522 (1994), along with the dissenting opinions of Chief Justice Moyer, Justice Pfeifer, and Justice Wright [A1]. The denial of the motion for a reconsideration of the decision, along with the dissents of three justices thereto, is reported at 70 Ohio St. 3d 1477, 650 N.E.2d 849 (1994) [A29].

BASIS FOR JURISDICTION

The final judgment of the Supreme Court of Ohio was entered on September 14, 1994. The Supreme Court of Ohio

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[2]Materials appearing in the Appendix to this petition will be referred to as ["A___"].

denied Petitioners' motion for reconsideration on November 2, 1994. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Ohio Revised Code § 4117.01(C):

> "Public employee" means any person holding a position by appointment or employment in the service of a public employer, including any person working pursuant to a contract between a public employer and a private employer and over whom the national labor relations board has declined jurisdiction on the basis that the involved employees are employees of a public employer . . .

29 U.S.C. § 152(2):

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as

an employer), or anyone acting in the capacity of officer or agent of such labor organization.

STATEMENT OF THE CASE

This case involves the doctrine of federal preemption: specifically, whether a state can regulate in the area of labor relations where the federal government has already regulated. Ohio Revised Code § 4117.01(C) defines who qualifies as a public employee. The statute recognizes the fact that federal law preempts state law concerning the determination of whether an employee of a private employer is subject to the jurisdiction of the National Labor Relations Board ["NLRB"]. The interpretation given the statute by the Supreme Court of Ohio, however, causes the statute to be in conflict with federal law: specifically, 29 U.S.C. § 152(2), and pronouncements of this Court in *Garner v. Teamsters Local Union,* 346 U.S. 485 (1953), and *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

In the early 1970s, the City of Hamilton entered into contracts with certain private corporations in order to operate a transit system within the City. The private corporations maintained a collective bargaining relationship and successive bargaining agreements with the Amalgamated Transit Union Local No. 738, dating back to the 1960s. These successive collective bargaining agreements always identified the private corporation owners or subcontractors as the employer despite the fact that the City of Hamilton became involved with partial funding of the system in the mid-1970s through the Urban Mass Transit Act. 49 U.S.C. §§ 1601-1613 (1988).

In 1987, the City, through competitive bidding, awarded a contract to ATE Management & Service Company, Inc. ("ATE") to operate a transit system for the City. ATE subsequently assigned its rights under the contract to Transit Management of Hamilton, Inc. ("TMH"). The City receives federal and state funds for operating the transit system. TMH hires employees for the system and is

responsible for managing all day-to-day personnel matters and assigning the bus drivers to different routes. TMH's General Manager maintains informal contact with a City representative.

On October 18, 1988, Amalgamated Transit Union Local No. 738 filed a "Request for Recognition" with the State of Ohio Employment Relations Board ("SERB"), naming the City of Hamilton as the employer. The Union requested that it be allowed to represent approximately 23 bus drivers and mechanics. Up until the filing of the Request for Recognition, there was no dispute as to who was the employer of the transit employees. In fact, the current collective bargaining agreement between TMH and the Union specifically designates the transit employees as employees of TMH. TMH and its predecessors have a long collective bargaining history with the transit employees. Hamilton did not actively participate in the negotiations for these agreements, nor was their approval contractually required.

In 1988, an officer of the Union filed a charge against the predecessor contractor, Charge No. 9-CA-26541, with the National Labor Relations Board. The charge was received, processed, investigated and dismissed by the Board due to lack of merit.

TMH has argued the federal question from the initial Request for Recognition, arguing that the issue of federal preeminence controlled the result: "The statute recognizes the preeminence of the NLRB in the area of public vs. private employee." TMH further argued in the SERB hearing that "[i]t is axiomatic that where there is potential for conflict, any initial adjudication regarding federal law should be made by the NLRB." Brief of Intervenor, Case No. 88-REP-10-0222, *In re Amalgamated Transit Union Local 738 and City of Hamilton*, at 4.

On December 18, 1989, a SERB hearing officer issued a recommendation that SERB dismiss the Union's Request for Recognition. The hearing officer applied the

"right to control" test, as set forth by the NLRB in *Baystate Bus Corp.*, 240 N.L.R.B. 862, 100 L.R.R.M. 1376 (1979), and *National Transportation Service*, 240 N.L.R.B. 565, 100 L.R.R.M. 1263 (1979), concluding that the employer of the employees in question was TMH. The hearing officer further reasoned that because the NLRB had not declined jurisdiction over these employees, the employees were not public employees as defined by Ohio Revised Code § 4117.01(C) and, therefore, were not within SERB's jurisdiction.

However, the SERB Board rejected the hearing officer's conclusions and recommendations. SERB improperly applied the "right to control" test in stating that TMH was the employer, calling TMH an agent of the City of Hamilton. SERB reasoned that because the City of Hamilton was the 'true' employer of the employees in question, it was within SERB's jurisdiction to entertain their Request for Recognition.

The City and TMH appealed the SERB decision to the Franklin County Court of Common Pleas. The trial court relied on the NLRB's opinion in *Baystate Bus*, *supra*, and held that TMH, and not the City, was the employer of the transit workers at issue.

The Union appealed the trial court's decision to the Franklin County Court of Appeals, and the court of appeals affirmed, holding that the NLRB declination of jurisdiction was an obligatory prerequisite for employees working under a private contract to be considered public employees under Ohio Revised Code § 4117.01(C). TMH and the City of Hamilton argued, and the court of appeals agreed, that "[t]he NLRB preempts state jurisdiction over labor activity that is arguably subject to the National Labor Relations Act and NLRB jurisdiction. In apparent recognition of that principle, R.C. 4117.01(C) creates a clear definition in cases involving a public employer who contracts with a private employer: SERB has jurisdiction over those employees for which [the]

NLRB has declined jurisdiction." 1993 Ohio App. LEXIS 1742, at *6. The appellate court reasoned, *inter alia*, that the definition in Ohio Revised Code § 4117.01(C) eliminated the potential for conflicting decisions from the NLRB and SERB, and deferred to the primary authority of the NLRB in collective bargaining matters.

The Union appealed the court of appeals' decision to the Supreme Court of Ohio, which held, in a four to three decision, that the workers at issue were public employees pursuant to Ohio Revised Code § 4117.01(C), thereby reversing the Franklin County Court of Appeals.

Ohio Revised Code § 4117.01(C) provides:

> 'Public employee' means any person holding a position by appointment or employment in the service of a public employer, including any person working pursuant to a contract between a public employer and a private employer and over whom the National Labor Relations Board has declined jurisdiction on the basis that the involved employees are employees of a public employer . . . .

Justice A. William Sweeney, writing for the majority, stated that the statute's reference to declination of NLRB jurisdiction was merely illustrative of persons who may be considered public employees for the purposes of collective bargaining. 70 Ohio St. 3d at 213. The Court then applied the NLRB's "right to control" test and held that "TMH lacks the type of discretion to meaningfully bargain with the Union in the collective bargaining context that a true employer would possess." *Id.* at 214 (footnote omitted).

Chief Justice Moyer, with Justice Wright concurring, applied the same "right to control" test, but concluded that TMH was, in fact, the true employer. He stated that

> [t]he clear teaching of the NLRB cases is that the proper area of focus is on those issues that arise most prominently in collective bargaining negotiations. Those issues are not the overall source of funding the transit system, the ownership of the buses, the bus routes and fares, or the identity of the employer's general manager. Rather, they are such things as wages, benefits, disciplinary procedures, and training. Federal courts have

> recognized these items as the 'bread and butter issues of collective bargaining.'

Id. at 216 (Pfeifer, J., dissenting) (citations omitted).

Finally, Justice Pfeifer, joined by Chief Justice Moyer, dissented by reasoning that the workers could not be public employees because the NLRB had not declined jurisdiction over them. The General Assembly, according to Justice Pfeifer, had left to the NLRB the right to determine whether the employees in question were "controlled" by a public employer. *Id.* at 217 (Pfeifer, J., dissenting).

REASONS FOR GRANTING THE WRIT

This case presents an important issue concerning the preemption doctrine. If the decision of the Supreme Court of Ohio is allowed to stand as written, Ohio public employment law will be in direct conflict with federal law as set forth in the opinions of the Supreme Court of the United States in *San Diego Building Trades Council v. Garmon*, 359

U.S. 236 (1959), and *Garner v. Teamsters Local Union*, 346 U.S. 484 (1953).

This case more specifically involves an important issue in federal-state relations. The Supreme Court of Ohio is attempting to judicially legislate in an area reserved to authority of the NLRB. *See, e.g., Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 473-74 (1954) (holding that where a state court had issued an injunction pursuant to a state statute to enjoin a labor union's conduct, the issue "ha[d] an importance in the federal-state relations regarding industrial controversies that led [the Court] to grant certiorari."). As recently as 1986, this Court stated that although certain principles are reasonably settled, "some controversy continues over the Act's preemptive scope." *Wisconsin Dep't of Indus., Lab. & Hum. Rel. v. Gould Inc.*, 475 U.S. 282, 286 (1986). "The [N]ational Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained

from telling us how much. We must spell out from conflicting indications of congressional will the area in which state action is permissible." *Garner*, 346 U.S. at 488 (footnote omitted).

This case presents an important opportunity to further delineate those areas in which a state may or may not act. The federal issue was presented from the first administrative hearing on October 12, 1990, through the denial of the City of Hamilton's motion for reconsideration by the Supreme Court of Ohio on November 2, 1994. This is an opportunity to curtail yet another state's impermissible intrusion into the ambit of the NLRB. *Cf. Gould Inc.*, 475 U.S. at 288-89 (stating that "[e]ach additional statute incrementally diminishes the Board's control over enforcement of the NLRA and thus further detracts from the 'integrated scheme of regulation' created by Congress").

The Supreme Court of Ohio, under the facts of this case, simply cannot take jurisdiction and regulate this matter

where such jurisdiction would be in conflict with and intrude upon the national labor relations policy and statutory scheme. In sum, the inevitable effect of the allowing the Supreme Court of Ohio's decision to stand is to allow a state to further intrude upon a "role Congress reserved exclusively for the Board." *Gould Inc.*, 475 U.S. at 291.

As regards the jurisdiction and preemptive powers of the NLRB, this Court has authoritatively stated that when the exercise of state power over a particular area of activity threatens interference with the clearly indicated federal policy of industrial relations, it is judicially necessary to preclude states from acting in such manner. *Building Trades Council*, 359 U.S. 236; *Garner*, 346 U.S. 485. In situations where it is clear or may be clearly assumed that activities which a state purports to regulate are within the jurisdiction of the NLRB, due regard to the federal enactment requires that state jurisdiction must yield. *Building Trades,* 359 U.S. at 244. This is true regardless of whether the state acts

through laws of broad general application or through laws specifically directed toward the governance of industrial relations. *Id.*

This fear in regard to potential conflict between state and federal law is glaringly evident in this case. The decision of the Supreme Court of Ohio concerning the issue of whether the NLRB may or may not have jurisdiction over the employees in question is inconsistent with federal law. Federal preemption exists because of the "disharmonies" present in the state and federal system, resulting in inconsistent standards of substantive law and remedial schemes. *Building Trades,* 359 U.S. at 242. This Court's decisions on the issue have recognized the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience on labor issues:

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. . . .

Garner, 346 U.S. at 490-91; *see also Building Trades*, 359 U.S. at 242, 243.

The Ohio Legislature clearly recognized this principle of federal preemption when drafting Ohio Rev. Code § 4117.01(C). The statute clearly recognizes the fact that federal law preempts state law concerning the determination of whether an employee of a private employer is subject to

jurisdiction of the NLRB. Pursuant to the statute, it is the act of declining jurisdiction by the NLRB that is the 'trigger' event that allows states to regulate the employees in question.

In its decision on this issue, the majority stated as follows:

> In our view, the statutory provision simply relates one of many situations where SERB may determine certain employees to be public employees. Thus, the fact that the NLRB did not or has not declined jurisdiction over the transit workers in issue is not determinative of SERB's jurisdiction in this case.

City of Hamilton v. SERB, 70 Ohio St. 3d at 213.

Unfortunately, the majority's statement ignores the federal law that governs this exact issue. Section 2 of the National Labor Relations Act provides that an employee includes any employee, except, *inter alia*, one working for any state or political subdivision of a state. 29 U.S.C. § 152(2) (1988). The initial adjudication regarding whether the employees in question are subject to federal jurisdiction must first be made by the NLRB under the *Garner* doctrine. *See*

Garner, 346 U.S. at 489-91; *see also Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955). It was not, and is not, left up to SERB to surmise how the NLRB would decide such an issue. As noted by this Court in *Garner*:

> It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. . . . But it is clear that the Board was vested with power to entertain petitioners' grievance, [and] to issue its own complaint against respondents . . . . The question then is whether the State, through its courts, may adjudge the same controversy and extend its own form of relief. . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board also exclude state courts from like action.

Garner, 346 U.S. at 489-91. The failure of the NLRB to assume jurisdiction does not leave the states free to regulate

activities they would otherwise be precluded from regulating. *Guss v. Utah Lab. Rel. Bd.*, 353 U.S. 1, 1 (1957). The rule is designed to prevent conflict in its broadest sense with the complex federal scheme of law, remedy and administration. *Wisconsin Dep't of Indus., Lab. & Hum. Rel. v. Gould, Inc.*, 475 U.S. 282, 286 (1986).

It is undisputed that when determining whether or not to assert jurisdiction over a private employer providing services on a contract basis to a state or political subdivision, the NLRB applies the right to control test annunciated in *National Transportation Service*, 240 N.L.R.B. 565, 100 L.R.R.M. 1263 (1979) and *Baystate Bus Corp.*, 240 N.L.R.B. 863, 100 L.R.R.M. 1376 (1979). As previously argued before the state courts in this matter, the NLRB would assert jurisdiction over the employees in question pursuant to the test set forth in those cases. As a result of the decision of the Supreme Court of Ohio, however, such a

finding would be contradictory to the finding of SERB and the opinion of the Supreme Court of Ohio.

Such a result is in clear contradiction to the federal labor policy goal of harmonized labor relations. To allow such a decision to stand or to allow the state to control an area or activity subject to federal regulation poses too great a danger of conflict with national labor policy. *Building Trades*, 359 U.S. at 246. Such a conflict is clearly what the Ohio Legislature was trying to avoid when it drafted this particular exception. The Court of Appeals recognized this potential conflict in its opinion on this issue:

> The NLRB preempts state jurisdiction over labor activity that is arguably subject to the National Labor Relations Act and NLRB jurisdiction. *See, generally, San Diego Building Trades Council v. Garmon* (1959), 359 U.S. 236; Lee M. Modjeska, NLRB Practice (1983 & 1991 Supp.) 18, at note 4, and the cases cited therein; 3 NLRA: Law and Practice, Section 11.01[1]. In apparent recognition of that principle, R.C. 4117.01(C) creates a clear delineation in cases involving a public employer who contracts with a private employer: SERB has jurisdiction over

> those employers for which [the] NLRB has declined jurisdiction. In making such determinations, NLRB applies the 'right to control' test, assessing whether the public employer retains such pervasive control over the contractual relationship and the conditions of employment that the public employer is deemed the employer for collective bargaining purposes. Given the discretion involved in interpreting any given set of facts under the 'right to control' test, the definition in R.C. 4117.01(C) eliminates the potential for conflicting decisions from the NLRB and SERB, and defers to the primary authority of the NLRB in collective bargaining matters.

City of Hamilton v. State of Ohio Employment Rel. Bd., Nos. 92AP-1345 & 92AP-1346, 1993 Ohio App. LEXIS 1742, at *6-7 (Ohio Ct. App. Mar. 23, 1993). The need to avoid conflict with federal labor law is not only explicit in the decisions of this Court, it is inherent in the Supreme Court of Ohio's own determination in the recent decision in *Ohio Historical Society v. State of Ohio Employment Relations Board*, 66 Ohio St. 3d 466, 613 N.E.2d 591 (1993). In *Ohio Historical Society*, the court held that a public employee is a person in the service of a public employer

including any person who is (1) working pursuant to a contract between a public employer and a private employer and (2) one over whom the NLRB has declined jurisdiction. *Id.* at 478; 613 N.E.2d at 600. As noted in Justice Resnick's dissenting opinion in *Ohio Historical Society,* the goal of the Act is to ensure that all employees would be covered by either SERB or the NLRB, but not both. "Moreover, the General Assembly, when it enacted R.C. Chapter 4117, attempted to provide that all employees in Ohio would be covered either by that chapter (if public employees) under SERB's jurisdiction unless expressly excluded, or by the National Labor Relations Act (if not public employees) under the jurisdiction of the NLRB." *Id.* at 481, 613 N.E.2d at 602 (Resnick, J., dissenting). The decision in the *Hamilton* case contradicts not only federal law and the pronouncements of this Court, but the language and reasoning found in its own decisions on this same issue.

The result of the decision of the Ohio Supreme Court will be confusion as to which administrative body has the right in the first instance to determine jurisdictional issues. Under the theory set forth by the Ohio Supreme Court in this matter, both SERB and the NLRB have jurisdiction to determine whether the employees in question are employees of a private employer or a public employer. Such a dual system of authority will clearly lead to conflicting decisions among the various state administrative bodies and the NLRB. This Court has recognized this dilemma in prior situations and ruled that federal law must preempt state law in these initial determinations to avoid such results. The Ohio legislature recognized this principle when defining a public employee by inserting the requirement that the NLRB must have first declined to exercise jurisdiction over the individual. The Ohio Supreme Court has virtually ignored federal precedent on this issue and the specific wording of the statute to reach its conclusion, setting in course a

collision with the preemption doctrine espoused by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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December 12, 1994

APPENDIX

Judgment of the Supreme Court of Ohio

City of Hamilton, Appellee, v.
State Employment Relations Board;
Amalgamated Transit Union, Local No. 738, Appellant.

Transit Management of Hamilton, Inc., Appellee, v.
State Employment Relations Board;
Amalgamated Transit Union, Local No. 738, Appellant.

Hamilton v. State Emp. Relations Bd.
No. 93-1021

SUPREME COURT OF OHIO

70 Ohio St. 3d 210; 638 N.E.2d 522; 1994 Ohio LEXIS 1984

April 20, 1994, Submitted
September 14, 1994, Decided

SUBSEQUENT HISTORY: Motion for Reconsideration Denied November 2, 1994, Reported at: 1994 Ohio LEXIS 2411.

PRIOR HISTORY: Appeal from the Court of Appeals for Franklin County, Nos. 92AP-1345 and 92AP-1346.

Beginning in the early 1970s, appellee, city of Hamilton entered into management contracts with various corporations in order to operate the city's public transit system. In 1987, the city conducted a competitive bidding

procedure and awarded a management contract to ATE Management and Service Company, Inc. ("ATE"). ATE assigned certain rights and obligations under the management contract to Transit Management of Hamilton, Inc. ("TMH") to operate the system.

The city receives federal and state funds for operating the transit system, and the city owns all of the fourteen buses used in the system and designates the bus routes. The city leases a garage from a private entity to house the buses and the TMH office. In addition, the city determines the bus fares, and fare monies collected are then deposited directly into a city revenue account.

On the other hand, TMH is responsible for managing day-to-day personnel matters and assigning bus drivers to routes. While the city has no direct contact with bus [**2] drivers or mechanics, TMH's general manager maintains informal daily contact with a city representative.

On October 18, 1988, appellant, Amalgamated Transit Union, Local No. 738 ("union") filed a request for recognition with the State Employment Relations Board ("SERB"), naming the city of Hamilton as the employer. The request indicated that the union sought to represent approximately twenty-three bus drivers and mechanics. The city subsequently objected to the request, asserting that TMH was the employer of the bus drivers and mechanics, and that these workers were not "public employees" pursuant to R.C. 4117.01(C). The matter thereafter proceeded to an evidentiary hearing before a SERB hearing officer.

In December 19, 1989, the hearing officer issued a recommendation that SERB dismiss the union's request for

recognition. In relevant part, the hearing officer concluded as follows:

" *** First, applying the 'right of control' test, I conclude that the employer of the employees in question is TMH. Thus, the petition is defective because it names the City as the employer, and the City is not the public employer of the employees here sought to be represented. Second, even if TMH had [**3] been named as the employer, the NLRB has not, in fact, declined jurisdiction over these employees on the basis that they are employees of a public employer. Thus, the employees are not 'public employees' as defined by [4117.01(C), and they do not fall within SERB's jurisdiction."

However, in an opinion issued by SERB, the board rejected the hearing officer's conclusions and recommendation as follows:

"The facts in this case clearly indicate that TMH lacks both the independence and decision making authority to carry out operation of the transit system on its own. TMH is a management business. It does not have its own resources (money, equipment or manpower) to run the transit system. Instead, for a fee, it performs essential managerial functions that are necessary for daily operation of the system. The City has the authority and resources to operate the transit system and TMH is obliged under the management agreement to adhere to the City's rules and regulations for doing so. The fact that the City, through an agreement, has delegated its management responsibilities to TMH does not in this case establish the latter as an independent contractor.

"TMH is not the employer of the bus drivers [**4] and mechanics at issue here, but is instead an agent of the City of Hamilton.

"Since the City of Hamilton is a public employer and is the employer of the employees in question, it is clearly in SERB's jurisdiction to entertain the request for voluntary recognition."

The city and TMH then filed appeals from the SERB decision before the court of common pleas. The trial court relied on a National Labor Relations Board ("NLRB") opinion concerning the "right to control" test (Baystate Bus Corp. [1979], 240 N.L.R.B. 862), and held, unlike SERB, that TMH, not the city, was the employer of the transit workers in issue.

Upon appeal by the union, the court of appeals affirmed, holding that NLRB declination of jurisdiction is an obligatory prerequisite for employees working under a private contract to be considered "public employees" under R.C. 4117.01(C). In relevant part, the appellate court reasoned:

" *** Given the discretion involved in interpreting any given set of facts under the 'right of control' test, the definition in R.C. 4117.01(C) eliminates the potential for conflicting decisions from the NLRB and SERB, and defers to the primary authority of the NLRB [**5] in collective bargaining matters.

Thus, strict application of the definition of a public employer under these circumstances dictates that the employees herein are not public employees, NLRB having not declined jurisdiction over them."

The cause is now before this court pursuant to the allowance of a motion to certify the record.

HEADNOTES: State Employment Relations Board -- Jurisdiction not precluded by R.C. 4117.01(C) in matters where National Labor Relations Board has not declined jurisdiction over employees working pursuant to a contract between a private and public employer -- City is public employer of public transit system's employees, when -- "Right to control" test, applied.

COUNSEL: Frost & Jacobs, Donald L. Crain and William L. Sennett; and Gary L. Sheets, Law Director, for appellee city of Hamilton.

Thomas P. Hock, for appellee Transit Management of Hamilton, Inc.

Stewart Jaffy & Associates Co., Stewart R. Jaffy and Marc J. Jaffy, for appellant Amalgamated Transit Union, Local 738.

JUDGES: A.W. Sweeney, Douglas, Resnick, F.E. Sweeney, Moyer, Wright, Pfeifer

OPINIONBY: A. WILLIAM SWEENEY

OPINION: [*212] A. William Sweeney, J. The determinative inquiry in this appeal is whether the transit workers in issue are "public employees" [**6] of the city of Hamilton pursuant to R.C. 4117.01(C). For the reasons that follow, we hold that the transit workers are public employees, and therefore we reverse the judgments of the courts below, and reinstate SERB's determination.

R.C. 4117.01(C) provides:

"'Public employee' means any person holding a position by appointment or employment in the service of a public employer, including any person working pursuant to a contract between a public employer and a private employer and over whom the national labor relations board had declined jurisdiction on the basis that the involved employees are employees of a public employer[.] *** "

The courts below strictly interpreted the foregoing language following the word "including" to mean that the NLRB must first decline jurisdiction over the [*213] transit workers before they could be statutorily considered as public employees. We disagree with this strict construction, inasmuch as it ignores the liberal construction mandate of R.C. 4117.22. n1 As the union correctly points out, the language in R.C. 4117.01(C) referring to the declination of NLRB jurisdiction is merely illustrative of who may be considered to be public employees for the purposes [**7] of collective bargaining. To adopt the lower courts' interpretation would require us to change the words "and over whom" in the statutory provision to read "but only where." In our view, the statutory provision simply relates one of many situations where SERB may determine certain employees to be public employees. Thus, the fact that the NLRB did not or has not declined jurisdiction over the transit workers in issue is not determinative of SERB's jurisdiction in this case.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - - -

n1 R.C. 4117.22 provides:

"Chapter 4117. of the Revised Code shall be construed liberally for the accomplishment of the purpose of promoting orderly and constructive relationships between all public employers and their employees."

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - -

Having determined that SERB jurisdiction is not precluded by R.C. 4117.01(C) in matters where the NLRB has not declined jurisdiction over employees working pursuant to a contract between a private and public employer, the question then turns to whether SERB was correct in finding that TMH was an agent of the city rather [**8] than an independent contractor.

All parties agree that the "right to control" test is determinative of whether the instant transit employees are public employees of the city or simply employees of TMH. As this court held in paragraph two of the syllabus in Gillum v. Indus. Comm. (1943), 141 Ohio St. 373, 25 O.O. 531, 48 N.E.2d 234:

"Whether one is an independent contractor or in service depends upon the facts of each case. The principal test applied to determine the character of the arrangement is that if the employer reserves the right to control the manner or means of doing the work, the relation created is that of master and servant, while if the manner or means of doing the work or job is left to one who is responsible to the employer only for the result, an independent contractor relationship is thereby created." See, also, Natl. Transp. Serv., Inc. (1979), 240 N.L.R.B. 565, where it was stated that under the National Labor Relations Act the "right to control" test contemplates "whether the employer has sufficient control over the employment conditions of its

employees to enable it to bargain [**9] with a labor organization as their representative." Id. at 565.

In reviewing the various indicia of control, or lack thereof, in the instant cause, the city and TMH submit that the management agreement between the two entities provides that TMH is the employer of the transit workers in issue and is [*214] responsible for the day-to-day operation of the transit system. In addition, SERB found that paychecks to the transit workers are drawn on a payroll account in the name of TMH and signed by TMH's general manager.

On the other hand, as found by SERB, it readily appears that the city owns, controls and sets policy for the transit system, and that the contract between ATE and the city specifically categorizes operating expenses as an obligation of the city. The city provides all of the funding for the transit system, owns all the buses, designates the bus routes, and sets the amount of fares charged for bus rides. In addition, according to SERB, the general manager of TMH was selected with the approval of the city.

Against this backdrop, the SERB opinion reviewed several aspects of the management contract and concluded:

"It is unnecessary to look any further than [**10] the four corners of the contract to conclude that the City, and not TMH, is responsible for the payment of the employees' wages and that the functions provided by TMH in carrying out such are only ministerial in nature. The conclusion that TMH is the employer in this case because it does the paperwork for deducting taxes and issues paychecks from an account bearing its name (one established with City revenue) is in parity with an argument that because a secretary or

payroll clerk performs these same tasks, that person is thereby the employer."

In our view, SERB's conclusion that the city is the public employer of the transit employees is amply supported by the evidence. The city has delegated ministerial duties to TMH through the device of a management contract, while maintaining its right to control the details of the transit system. Given the fact that the city has total control of TMH's funding, we believe that TMH lacks the type of discretion to meaningfully bargain with the union in the collective bargaining context that a true employer would possess. n2 Thus, we agree with SERB that it had the requisite jurisdiction to entertain the union's request for recognition, since application [**11] of the "right to control" test indicates that the city of Hamilton is the employer of the transit workers, who are "public employees" pursuant to R.C. 4117.01(C).

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n2 Our decision in this regard is similar to the reasoning of the National Labor Relations Board in Res-Care, Inc. (1986), 280 N.L.R.B. 670, 673:

" *** if an employer does not have the final say on the entire package of employee compensation, i.e., wages and fringe benefits, meaningful bargaining is not possible." See, also, PHP Healthcare Corp. (1987), 285 N.L.R.B. 182, 184.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Our holding is further compelled by the standard that SERB's findings are entitled to a presumption of correctness.

See Ohio Historical Soc. v. State Emp. Relations Bd. (1993), 66 Ohio St. 3d 466, 471, 613 N.E.2d 591, 595, citing Univ. of [*215] Cincinnati v. Conrad (1980), 63 Ohio St.2d 108, 111-112, 17 O.O.3d 65, 67, 407 N.E.2d 1265, 1268. [**12] While the lower courts purportedly applied the "presumption of correctness" standard, we believe their decisions amounted to nothing more than a substitution of judgment for what SERB correctly found to be the employment relationship of the transit workers to the city of Hamilton under the management contract in issue.

Therefore, based on the foregoing, we reverse the judgment of the court of appeals below, and reinstate the decision of SERB.

Judgment accordingly.

Douglas, Resnick and F.E. Sweeney, JJ., concur.

Moyer, C.J., Wright and Pfeifer, JJ., dissent.

DISSENTBY: MOYER; PFEIFER

DISSENT: Moyer, C.J., dissenting. Despite my agreement with several important assertions of the majority, I respectfully dissent. I agree that the provisions of R.C. Chapter 4117 are to be construed liberally to "promote orderly and constructive relationships between all public employers and their employees." R.C. 4117.22. I agree also that a National Labor Relations Board ("NLRB") declination of jurisdiction over persons working pursuant to a contract between a public employer and a private employer is not the determinative event for a public employee. Finally, I agree with the majority that the "right of control" test is [**13]

appropriate to determine the status of public employee under R.C. 4117.01(C).

It is the application of that test, however, that generates my strong disagreement with the majority. The NLRB announced its adoption of the right of control test in Natl. Transp. Serv., Inc. (1979), 240 N.L.R.B. 565. This test analyzes "whether the nonexempt employer retains sufficient control over its employees' terms and conditions of employment so as to be capable of effective bargaining with the employees' representative." Id. In Baystate Bus Corp. (1979), 240 N.L.R.B. 862, the NLRB applied the right of control test and concluded that the employees of a private Massachusetts corporation engaged in the operation and management of a municipal transit system were private employees. In reaching this conclusion, the NLRB noted that "Baystate is responsible for the day-to-day operation of the transit system and has sole responsibility for hiring all of its employees; it unilaterally sets the wages, fringe benefits, hours, and working conditions for its employees. The Company also retains the authority to discipline its employees without any interference [**14] from [the political subdivision]." Id. NLRB noted also that the political subdivision did not participate in the negotiation of the present collective bargaining agreement. Id. NLRB concluded that "Baystate retains sufficient control over the working conditions of its employees to enable it to engage in [*216] meaningful bargaining over conditions of employment with Petitioner." Id. at 863.

The facts of the case at bar closely resemble those of Baystate. The majority describes the responsibilities of Transit Management of Hamilton, Inc. ("TMH") as "managing day-to-day personnel matters and assigning bus drivers to routes." The majority paints TMH's

responsibilities with far too broad a brush. The State Employment Relations Board ("SERB") hearing officer found that TMH's duties include hiring, firing, laying off, supervising, and disciplining employees, establishing and implementing work rules, safety and training programs, negotiating wages, benefits, and terms and conditions of employment, paying health insurance premiums, assigning drivers and managing payroll. In other words, TMH is solely responsible for all aspects of the transit system's daily operations, [**15] without the need for advice or approval from the city.

The majority cites to several functions the city retains. These include the city's provision of funding for the system, ownership of the buses, designation of bus routes and establishment of fares. Also, the city approves the selection of TMH's general manager. The majority's concentration on these elements is misplaced. The clear teaching of the NLRB cases is that the proper area of focus is on those issues that arise most prominently in collective bargaining negotiations. Those issues are not the overall source of funding of the transit system, the ownership of the buses, the bus routes and fares, or the identity of the employer's general manager. Rather, they are such things as wages, benefits, disciplinary procedures, and training. Federal courts have recognized these items as "the bread and butter issues of collective bargaining." R.W. Harmon & Sons, Inc. v. N.L.R.B. (C.A.10, 1981), 664 F.2d 248, 251; Jefferson Cty. Community Ctr. v. N.L.R.B. (C.A.10, 1984), 732 F.2d 122. A case that the majority itself cites in a footnote, Res-Care, Inc. (1986), 280 N.L.R.B. 670, [**16] recognizes this same conclusion, stating that the party responsible for setting wages and fringe benefits is solely able to participate in meaningful bargaining. In the case at bar, that party is TMH, not the city.

The majority's reliance on Gillum v. Indus. Comm. (1943), 141 Ohio St. 373, 25 O.O. 531, 48 N.E.2d 234, is also misplaced. Gillum is a case decided under superseded workers' compensation law to decide the existence of an independent contractor relationship. The policy considerations behind classifications in workers' compensation law do not mirror those appropriate to determine proper parties for collective bargaining. Gillum involved a rule to determine ultimate responsibility for a worker's death; the instant case involves a rule of organization and efficiency for collective bargaining. Gillum is therefore entitled to little or no weight.

[*217] Finally, as the SERB hearing officer recognized, the union has contractually recognized that TMH is the employer of its members. The prior labor agreement entered into between TMH and the union specifically designates the union as the exclusive representative of the employees of [**17] the company. I agree with the hearing officer that the equitable principle of estoppel militates against the union's argument that its members are now employees of the city.

The court of appeals was correct in stating that R.C. Chapter 4117 should be interpreted so as to avoid conflicts with NLRB's interpretation of federal law. It is clear to me that if NLRB were asked to assert jurisdiction and it followed the reasoning of its past decisions, it would conclude that the union members are not public employees.

The majority's decision ignores or misapplies clear existing law, and places SERB on a collision course with NLRB. For these reasons, I respectfully dissent.

Wright, J., concurs in the foregoing dissenting opinion.

Pfeifer, J., dissenting. There is no dispute that the employees in question are working pursuant to a contract between the city of Hamilton and TMH(as assignee). R.C. 4117.01(C) simply and clearly addresses under what circumstances such employees are to be considered "public employees":

"'Public employee' means any person holding a position by appointment or employment in the service of a public employer, including any person working pursuant to a contract between [**18] a public employer and a private employer and over whom the national labor relations board has declined jurisdiction on the basis that the involved employees are employees of a public employer[.] * * * " (Emphasis added.)

Thus, the definition can include persons working pursuant to a contract with a private employer, but only if the NLRB has declined jurisdiction over the employees. The General Assembly has left to the NLRB the determination of whether employees apparently employed by a private employer are actually controlled by a public employer, and thus "employed" by the public employer for collective bargaining purposes. This is neither a strict nor liberal construction of the statute -- it is the only possible construction.

Therefore, the NLRB having not declined jurisdiction over these employees, I would hold that they are not public employees.

Moyer, C.J., concurs in the foregoing dissenting opinion.

Judgment of the Tenth Appellate District,
Franklin County, Ohio

City of Hamilton, Ohio, Appellant-Appellee, v.
State Employment Relations Board, Appellee-Appellee,
Amalgamated Transit Union, Local 738,
Appellee-Appellant.
Transit Management of Hamilton, Inc.,
Appellant-Appellee, v.
State Employment Relations Board, Appellee-Appellee,
Amalgamated Transit Union, Local No. 738,
Appellee-Appellant.

City of Hamilton v. State Emp. Relations Bd.

Nos. 92AP-1345, 92AP-1346 (REGULAR CALENDAR)

COURT OF APPEALS OF OHIO,
TENTH APPELLATE DISTRICT,
FRANKLIN COUNTY

1993 Ohio App. LEXIS 1742

March 23, 1993, Rendered

PRIOR HISTORY: APPEALS from the Franklin County Court of Common Pleas.

DISPOSITION: Judgments affirmed.

COUNSEL: Frost & Jacobs, and Donald L. Crain; Gary L. Sheets, for City of Hamilton, Ohio.

Lee Fisher, Attorney General, and Wayne Kriynovich, for State Employment Relations Board.

Stewart Jaffy & Associates Co., L.P.A., Stewart R. Jaffy and Marc J. Jaffy, for Amalgamated Transit Union, Local No. 738.
Thomas P. Hock and Joan M. Baker, for Transit Management of Hamilton, Inc..

JUDGES: BRYANT, WHITESIDE, YOUNG

OPINIONBY: BRYANT

OPINION: OPINION

BRYANT, P.J.

Appellee-appellant, Amalgamated Transit Union, Local No. 738 ("Union"), appeals from judgments of the Franklin County Court of Common Pleas reversing the decision of the State Employment Relations Board ("SERB") that the Union members were public employees of the city of Hamilton ("City") and subject to the Collective Bargaining Act, R.C. Chapter 4117, and finding instead that they were private employees employed by Transit Management of Hamilton, Inc. ("TMH").

The City historically has entered into management contracts with various private contractors to provide the City's public [*2] transit services. In 1987, after competitive bidding, the City awarded a management contract to ATE Management & Service, Inc. ("ATE") to operate the transit system. ATE subsequently assigned its contractual rights to its corporate subsidiary, TMH.

The Union filed a request for recognition with SERB on October 18, 1988 naming the City as employer and seeking a bargaining unit of approximately twenty-three bus drivers and mechanics. The City subsequently filed objections to the request for recognition, arguing that the bus drivers and mechanics involved are not "public employees" as defined by R.C. 4117.01(C). TMH later filed a motion to intervene as a party to the dispute, arguing that it is the employer of the bus drivers and mechanics in question.

A hearing examiner for SERB conducted an evidentiary hearing on October 4, 1989, and issued a written recommendation to SERB in which she concluded that TMH was the employer and that the request for recognition should be denied. SERB adopted all of the recommended determinations and findings of the hearing examiner, except the examiner's conclusions as to employee status. SERB did not make new findings of fact, but gave different [*3] interpretation to the findings made, ultimately concluding that the City was the employer of the bus drivers and mechanics and that the employees at issue were public employees within the meaning of R.C. 4117.01(C). On appeal, the common pleas court reversed SERB's determination and found that TMH, not the City, was the employer of the Union members. The Union appeals therefrom assigning four errors:

"1) The Trial Court erred by applying the wrong standard for review.

"2) The Trial Court erred in not giving due deference to SERB's determination that the City, not T.M.H., was the Employer.

"3) The Trial Court erred in finding that SERB's decision not supported by reliable, probative, and substantial evidence and was not in accordance with the law.

"4) The Trial Court erred in finding that T.M.H. is the Employer and the City is not the Employer."

The Union's four assignments of error are interrelated and raise the similar issue of whether the trial court correctly applied the appropriate legal standard of review in reversing SERB's determination that the City, not TMH, is the employer therein. Because the issues are interrelated, all four assignments of error are addressed [*4] together.

Substantively, the issue is whether the Union's employees are public employees capable of participating in the state employee collective bargaining scheme, a determination that ultimately turns on who is considered the employer of the employees for collective bargaining purposes. R.C. 4117.01(C) defines a "public employee" as follows:

"* * * Any person holding a position by appointment or employment in the service of a public employer, including any person working pursuant to a contract between a public employer and a private employer and over whom the national labor relations board has declined jurisdiction on the basis that the involved employees are employees of a public employer * * *."

The statutory definition generally contemplates two possible situations in which an employee qualifies as a public employee. Initially, an individual qualifies as a public employee if he or she works directly for, and is on the payroll of a "public employer," such as state or local

government. See R.C. 4117.01(B) (definition of public employer). However, a person is also a public employee if a public employer contracts with a private employer to provide services but the public [*5] employer retains such pervasive control over the contractual relationship and the conditions of employment that the public entity is deemed the employer for collective bargaining purposes. See Ohio Historical Society v. State Emp. Relations Bd. (Oct. 29, 1991), Franklin App. No. 91AP-97, unreported (1991 Opinions 5126, 5139). In such situations, R.C. 4117.01(C) defines public employees as "including any person working pursuant to a contract between a public employer and a private employer and over whom the National Labor Relations Board ("NLRB") has declined jurisdiction." R.C. 4117.01(C). n1 The Union contends that the "including" language is illustrative and that NLRB declination of jurisdiction is merely one of many situations in which SERB can determine that employees are public employees. TMH and City, in contrast, contend that NLRB declination of jurisdiction is obligatory for an employee working pursuant to a private contract to qualify as public employees.

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n1 The NLRB has not expressly declined jurisdiction over the employees involved in the present case. Rather, the NLRB has simply refused to give an advisory opinion on the issue of whether the NLRB would decline to assert jurisdiction over the labor activity involved. See City of Hamilton (Mar. 25, 1991), 302 NLRB No. 25.

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[*6]

The NLRB preempts state jurisdiction over labor activity that is arguably subject to the National Labor Relations Act and NLRB jurisdiction. See, generally, San Diego Bldg. Trades Council v. Garmon (1959), 359 U.S. 236; Lee M. Modjeska, NLRB Practice (1983 & 1991 Supp.) 18, at note 4, and the cases cited therein; 3 NLRA: Law and Practice, Section 22.01[1]. In apparent recognition of that principle, R.C. 4117.01(C) creates a clear delineation in cases involving a public employer who contracts with a private employer: SERB has jurisdiction over those employers for which NLRB has declined jurisdiction. In making such determinations, NLRB applies the "right to control" test, assessing whether the public employer retains such pervasive control over the contractual relationship and the conditions of employment that the public employer is deemed the employer for collective bargaining purposes. Given the discretion involved in interpreting any given set of facts under the "right to control" test, the definition in R.C. 4117.01(C) eliminates the potential for conflicting decisions from the NLRB and SERB, and defers to the primary authority of the NLRB in [*7] collective bargaining matters.

Thus, strict application of the definition of a public employer under these circumstances dictates that the employees herein are not public employees, NLRB having not declined jurisdiction over them. n2

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n2 City and TMH argue that they attempted to resolve the jurisdictional question by requesting an advisory opinion from the NLRB but that Union thwarted their effort. However, even if consenting parties are able to obtain such an opinion, it is only advisory, not final, and therefore does not constitute a definitive NLRB declination of jurisdiction

necessary to satisfy the statutory language of R.C. 4117.01(C).

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NLRB declination being a prerequisite to the exercise of SERB jurisdiction over the Union's employees, any conclusions we might offer in applying the "right to control" test to the facts herein would be merely advisory and not binding. Thus, we do not address that argument.

Finally, the Union argues that the common pleas court applied the wrong legal standard in independently [*8] determining the evidence and finding the evidence supporting SERB's decision to be insufficient. Further, the Union urges that the common pleas court failed to give due deference to SERB's interpretation of R.C. Chapter 4117, as required by Lorain City Bd. of Edn. v. State Emp. Relations Bd. (1988), 40 Ohio St.3d 257, 533 N.E.2d 264, paragraph two of syllabus.

Given our disposition of the jurisdictional issue, any error in the trial court with respect to the appropriate legal standard to be applied to a SERB decision is not prejudicial.

Thus, the Union's first, second, third and fourth assignments of error are overruled. Having overruled all four assignments of error, we affirm the judgments of the common pleas court.

Judgments affirmed.

WHITESIDE and YOUNG, JJ., concur.

Judgment and Opinion of
Ohio Public Employment Relations Board

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In re Amalgamated Transit Union, Local No. 738, Employee Organization, and City of Hamilton and Transit Management of Hamilton/ATE, Employer.

CITY OF HAMILTON & TRANSIT MANAGEMENT OF HAMILTON/ATE
Docket No. 88-REP-10-0222

Ohio State Employment Relations Board
1990 OPER (LRP) LEXIS 4116; SERB 90-018
October 12, 1990, Decided

October 12, 1990, Issued

HEADNOTES:

Jurisdiction - Public Employer - Determination - 01.1, 11.12, 15.511, 15.531, 71.74

City, rather than transit company was employer of proposed bargaining unit of bus drivers and mechanics where city owned buses used by transit system, designated bus routes and fixed bus fares. Moreover, general manager who managed daily operation of transit system served with approval of the city and maintained daily contact with city representative. Accordingly, hearing officer's decision, 7 OPER 7044 1989, was amended and transit union was certified as exclusive representative of bargaining unit of bus drivers and mechanics.

PANEL: Before Sheehan, Chairman; and Latane, Board Member
OPINION:

Certification Pursuant to Request for Recognition
(Opinions attached.)

On October 18, 1988, the Amalgamated Transit Union, Local 738 (Employee Organization) filed a request for recognition seeking to represent certain employees of the City of Hamilton and Transit Management of Hamilton/ATE (Employer). The Board directed the case to hearing.

The Board has reviewed the record, the hearing officer's recommended determination, 7 OPER 7044, exceptions and response. The Board amends Conclusion of Law No. [*2] 3 to read: "The City of Hamilton is the employer of the bus drivers and mechanics at issue."; amends Conclusion of Law No. 4 to read: "The request for recognition as filed is valid."; deletes Conclusion of Law No. 6; amends Conclusion of Law No. 7 to read: "The employees at issue are public employees within the meaning of O.R.C. 4117.01(C)."; amends Recommendation No. 2 to read: "The Board certifies the Amalgamated Transit Union, Local No. 738 as the exclusive representative for all employees in the bargaining unit."

The Board adopts the hearing officer's Stipulations, Findings of Fact, the Conclusions of Law as amended and the Recommendations as amended and certifies the employee organization as the exclusive representative of all employees in the following appropriate unit:

Included:Bus drivers and mechanics.

Excluded:Supervisors, office and clerical employees.

It is so directed.

CONCURBY:
SHEEHAN, Chairman, and LATANE, Board Member, concur.

CONCUR:

Opinion
Latane, Board Member:

I

This case involves an employee organization, Amalgamated Transit Union, Local 738 (Union), which filed a Request for Recognition with the State Employment Relations Board seeking representation [*3] of approximately twenty-three bus drivers and mechanics. The request named the City of Hamilton (City) as the employer. The City objected to being named as such, pointing out that it had contracted out management of its mass transit service to ATE Management and Service Company, Inc. (ATE). In turn, ATE, pursuant to the management agreement with the City, assigned its duties to a subsidiary corporation, Transit Management of Hamilton, Inc. (TMH). The City contends that the bus drivers and mechanics in question are employees of TMH.

On June 22, 1989, the Board directed this matter to hearing for determination of all relevant issues. This case was assigned to a Board Hearing officer. On August 31, 1989, TMH filed a Motion to Intervene on the grounds that it was the employer of the bus drivers and mechanics. The Hearing

officer granted this motion and an evidentiary hearing was conducted on October 4, 1989.

II

This issue in this case is:

Whether the City of Hamilton is the public employer of the bus drivers and mechanics employed in the public transit system, thus giving SERB jurisdiction to entertain the request for recognition.

III

The City of Hamilton has historically [*4] entered into management contracts with various corporations to operate the City's public transit system. In late 1987, the City awarded a management contract to ATE. ATE assigned certain rights and obligations under the management contract to TMH, which currently operates the system. A general manager, Mr. David Braun, hired by ATE, but serving with the approval of the City, is responsible for the day to day operation of the transit system.[1]

The City receives federal and state funds for the operation of the transit system.[2] The City owns all the buses used in its operation and designates the bus routes. The City leases a garage from a private entity and makes it available to TMH

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[1]Finding of Fact (F.F.) 1.

[2]F.F. 3

for housing the buses and the TMH office.[3] The City determines the amount of fare to be charged customers, and the fare box monies are deposited directly into a City revenue account.[4] The City has no direct contact with the bus drivers or mechanics, however, the general manager does maintain informal daily contact with a City representative.[5] Mr. Braun is responsible for managing personnel matters on a daily basis and assigning the drivers to the routes.[6] With the help of an independent bookkeeper, Mr. [*5] Braun also regulates the daily financial operation of TMH.[7]

The management agreement between ATE and the City provides, among other things, that if the agreement expires or is terminated, the City will become the employer of the transit system employees, and that the City will assume responsibility for the payment and performance of all obligations arising out of the employment relationship.[8]

In determining whether the private entity (TMH) or the public entity (City of Hamilton) was the correct employer, the Hearing Officer applied the common law right of control test. That test states that:

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[3]Stipulation 17 and F.F. 7.

[4]F.F. 5

[5]F.F. 17 and 18.

[6]F.F. 11

[7]F.F. 14

[8]F.F. 14

If the recipient of the services in question has a right to control not only the end to be achieved but also the means to be used in reaching such result, an employer relationship exists as a matter of law; otherwise there exists an independent contractor relationship.[9]

Application of this test led the Hearing Officer to conclude that TMH is an independent contractor which employed the bus drivers and mechanics at issue.

The Board disagrees. In the instant case, the recipient of the services is the City of Hamilton and the management agreement between ATE/TMH and the City [*6] leaves little doubt that the latter not only has a right to control the end to be achieved but also the means to be used in reaching such. For the following reasons the application of the right of control test to the facts of this case lead this Board to the conclusion that TMH is an agent of the City, not an independent contractor.

TMH does not control the means of operating the transit system. The City owns, controls and sets policy for the transit system. The contract between ATE and the City specifically delineates operating expenses and states that such shall be an obligation of and paid by the City. The City owns all the buses used in providing the transit service, designates the bus routes and determines the amount of fare. The only role that TMH plays in operating the transit system is assigning drivers to their routes.

The City contracted out the day to day personnel operations of the transit system, but retained ultimate control over the

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[9]National Freight, Inc., 55 LRRM 1259, 1260 (1964).

employees through its authority over the manager. The Hearing Officer dismisses the fact that the general manager, who is responsible for this task, was selected with the approval of the City to provide daily management (which [*7] includes hiring, firing, supervising and disciplining the employees at issue) "for and on behalf of the city."[10]

The general manager serves only with the City's approval and carries out the policies of the transit system for and on behalf of the City. The Board cannot find that Mr. Braun is exercising the independent judgment required of an independent contractor, but instead finds that he serves primarily as an agent of the City, administering public funds and personnel for a public transit system.

TMH and ATU are parties to a labor agreement which covers the employees at issue and the City is not a signatory to that agreement. While it is true that the City did not sign the labor agreement, the Board cannot agree with the Hearing Officer that it had no involvement in it. Here again the argument can be made that while the City had no direct involvement, its interest was protected through the general manager in his capacity as the agency of the city.

As a factual matter, paychecks to the bus drivers and mechanics are drawn on payroll account in TMH's name and signed by its general manager. Additionally, TMH makes deductions for union dues, federal, state and local taxes,

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[10]ATE and City of Hamilton Management Agreement, Section 5.

[*8] and savings and IRA accounts.[11] The Board is not persuaded however, that these are indicia of independent contractor status.

While the city may play a less visible or more indirect role in establishing the wages of the bus drivers and mechanics, it is directly involved in the payment of such wages. Pursuant to the management agreement between ATE and the City, the latter is responsible for the payment of "operating expenses" for the transit system. The agreement specifically states that this term includes all wages and compensation of all personnel, (excluding the general manager who is paid by ATE), all payroll, social security, property and all other taxes pertaining to the operation of the transit system. The agreement states that operating expenses shall be an obligation of and paid by the City.[12] Additionally, the agreement states that:

...revenue derived from the operation of the transit system, whether from passengers or from other sources, shall be and remain from the initial receipt thereof, the absolute property of the City and the treatment of such revenue, including the banking thereof, and the accounting therefore, shall be as directed by the city.[13]

It is [*9] unnecessary to look any further than the four corners of the contract to conclude that the City, and not TMH, is responsible for the payment of the employees' wages and that the functions provided by TMH in carrying

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[11]Hearing Officer's Recommended Determination, p. 12.

[12]Management Agreement, Section 9.

[13]Management Agreement, Section 12.

out such are only ministerial in nature. The conclusion that TMH is the employer in this case because it does the paperwork for deducting taxes and issues paychecks from an account bearing its name (one established with City revenue) is in parity with an argument that because a secretary or payroll clerk performs these same tasks, that person is thereby the employer.

The Hearing Officer found that even though the transit system's funds were primarily public, the City had no involvement in how the funds were spent or apportioned, save ensuring that TMH did not exceed the level of grant money allocated for the transit system. For the following reasons the Board finds this determination in error see 7 OPER 7044 (1989).

Perusal of the management agreement between ATE and the City readily evinces that the City is directly involved in how transit system funds are spent and allocated. First of all, the contract calls for ATE to deposit all revenue to the accounts of [*10] the City from which the City furnishes ATE with funds to pay all the operating expenses. The month to month advance is equal to the estimated cash requirements for the succeeding month. The City, without cost to ATE, furnishes reasonable business expenses incurred by ATE, such as utilities, supplies, communication services, postage, etc.[14]

ATE is required, pursuant to contract, to keep and maintain the books and records reflecting the operation of the transit system in conformity with the requirements of the City and at the direction of the City. ATE must also render and certify to the City full and complete monthly or other operating

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[14]Management Agreement, Section 10.

reports and financial statements as the City requires.[15] Lastly, ATE must permit an authorized representative of the City to inspect and audit all data records of ATE relating to its performance.[16]

The facts in this case clearly indicate that TMH lacks both the independence and decision making authority to carry out operation of the transit system on its own. TMH is a management business. It does not have its own resources (money, equipment or manpower) to run the transit system. Instead, for a fee, it performs essential managerial functions [*11] that are necessary for daily operation of the system. The City has the authority and resources to operate the transit system and TMH is obliged under the management agreement to adhere to the City's rules and regulations for doing so. The fact that the City, through an agreement, has delegated its management responsibilities to TMH does not in this case establish the latter as an independent contractor.

TMH is not the employer of the bus drivers and mechanics at issue here, but is instead an agent of the City of Hamilton.

Since the City of Hamilton is a public employer and is the employer of the employees in question, it is clearly in SERB's jurisdiction to entertain the request for voluntary recognition.

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[15]Management Agreement, Section 12.

[16]Management Agreement, Section 15.

Hamilton v. State Emp. Relations Bd.
Hamilton v. State Emp. Rels. Bd.

93-1021

SUPREME COURT OF OHIO

70 Ohio St. 3d 1477; 640 N.E.2d 849; 1994 Ohio LEXIS 2411

November 2, 1994, Decided

PRIOR HISTORY: Franklin County, Nos. 92AP-1345 and 92AP-1346. Reported at: 70 Ohio St.3d 210, 638 N.E.2d 522.

Original Opinion of September 14, 1994, Reported at: 1994 Ohio LEXIS 1984.

JUDGES: Moyer, C.J., Wright and Pfeifer, JJ., dissent.

OPINION: On motion for reconsideration by city of Hamilton. Motion denied.

Moyer, C.J., Wright and Pfeifer, JJ., dissent.

Supreme Court, U.S.
JAN 13 1995
OFFICE OF THE CLERK

CASE NO. 94-1089

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CITY OF HAMILTON, OHIO;
TRANSIT MANAGEMENT OF HAMILTON, INC.,
Petitioners,

v.

AMALGAMATED TRANSIT UNION LOCAL 738,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a State Supreme Court decision which interprets a State Statute, Ohio Revised Code Section 4117.01(c), and classifies employees as public employees under that statute, conflicts with federal labor law which has explicitly excluded public employees from its terms.

PARTIES TO THE PROCEEDING

Respondent Amalgamated Transit Union Local 738 agrees with the listing of parties contained in the petition for Certiorari. Amalgamated Transit Union Local 738 is a Union, affiliated with the International Union known as the Amalgamated Transit Union. Amalgamated Transit Union Local 738 is not a corporation.

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CASE NO. 94-1089

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CITY OF HAMILTON, OHIO;
TRANSIT MANAGEMENT OF HAMILTON, INC.,

Petitioners,

v.

AMALGAMATED TRANSIT UNION LOCAL 738,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

Respondent Amalgamated Transit Union Local 738 respectfully requests that the Petitioners request for a writ of certiorari be denied.

OPINIONS BELOW

Amalgamated Transit Union Local 738 agrees with the listing of opinions below contained in the petition for certiorari.

BASIS FOR JURISDICTION

There is no basis for jurisdiction in the United States Supreme Court. This case involves solely matters of state law, and the interpretation of who is a "public employee" under Ohio state law. The Ohio State Employment Relations Board found, and the Ohio Supreme Court affirmed, that the Employees involved in this case were state employees, under the state law definition. Therefore, no federal question exists pursuant to 28 U.S.C. Section 1257.

STATUTES INVOLVED

This case solely involves the definition of "public employee" pursuant to Ohio Revised Code Section 4117.01(c).

STATEMENT OF THE CASE

This case involves the definition of "public employee" under Ohio Revised Code Section 4117.01(c).

Amalgamated Transit Union Local 738 [hereinafter referred to as "Local 738"], filed a Representation Petition before the State Employment Relations Board [hereinafter referred to as "SERB"] seeking to represent Bus Drivers and Mechanics providing bus service in the City of Hamilton [hereinafter referred to as "City"].

The issue before SERB was:

> Whether the City of Hamilton is the public employer of the bus drivers and mechanics employed in the public transit system, thus giving SERB jurisdiction to entertain the request for recognition.
>
> SERB opinion, p. 1

SERB answered this question affirmatively, and held that Transit

Management of Hamilton [hereinafter referred to as "A.T.E." or "T.M.H."] was merely an agent, and the City was the true employer.

SERB decided that T.M.H. was merely an agent of the City because:

> The facts in this case clearly indicate that **T.M.H. lacks both the independence and decision making authority** to carry out operation of the transit system on its own. **T.M.H. is a management business. It does not have its own resources** (money, equipment or manpower) to run the transit system. **Instead, for a fee, it performs essential managerial functions** that are necessary for daily operation of the system. The City has the authority and resources to operate the transit system and **T.M.H. is obliged under the management agreement to adhere to the City's rules and regulations** for doing so. The fact that the City, through an agreement, has delegated its management responsibilities to T.M.H. does not in this case establish the latter as an independent contractor.
>
> SERB opinion, p. 5 [Emphasis added].

SERB found that there was a management agreement between the City and T.M.H., but the City was the Employer of the Employees at issue.

The City and T.M.H. appealed SERB's decision to the Court of Common Pleas. The Court of Common Pleas reversed SERB.

Local 738 appealed to the Court of Appeals.

The Court of Appeals found that SERB did not have jurisdiction over the matter as a result of its interpretation of the statutory definition of "public employee."

Local 738 appealed from the Court of Appeals decision to the Supreme Court of Ohio.

The Supreme Court of Ohio reversed the Court of Appeals. The Supreme Court held that, as a matter of state statutory law, the employees involved were public employees.

The Ohio Supreme Court recognized:

> The determinative inquiry in this appeal is whether the transit workers at issue are "public employees" of the city of Hamilton pursuant to R.C. 4117.01(C). For the reasons that follow, **we hold that the transit workers are public employees. . .**
>
> Ohio Supreme Court decision, *Hamilton v. State Emp. Relations* (1994), 70 Ohio St.3d 210, 212.
>
> Emphasis added.

Based on the facts of the case, the Supreme Court concluded that

> it readily appears that the city owns, controls and sets policy for the transit system, and that the contract between ATE and the city specifically categorizes operating expenses as an obligation of the city. The city provides all of the funding for the transit system, owns all the buses, designates the bus routes, and sets the amounts of fares charged for the bus rides. In addition, according to SERB, the general manager of TMH was selected with the approval of the city.

Ohio Supreme Court decision, *Hamilton v. State Emp. Relations* (1994), 70 Ohio St.3d 210, 214.

In its opinion that the City was the true employer, SERB found the following facts:

1. T.M.H.'s "general manager serves only with the City's approval." [SERB op., p. 3]

2. The general manager "serves primarily as an agent of the City, administering public funds and personnel for a public transit system." [SERB op., p. 3]

3. The general manager "carries out the policies of the transit system for and on behalf of the City." [SERB op., p. 3]

4. The general manager was not "exercising the independent judgment required of an independent contractor." [SERB op., p. 3]

5. "While the City may play a less visible or more indirect role in establishing the wages of the busdrivers and mechanics, it is directly involved in the payment of such wages." [SERB op., p. 4]

6. The City, not T.M.H., "is responsible for the payment of such wages." [SERB op., p. 5]

7. The City, not T.M.H., "is responsible for the payment of `operating expenses' for the transit system." This means the City is responsible for "all wages and compensation of all personnel (excluding the general manager who is paid by A.T.E.), all payroll, social security, property and all other taxes pertaining to the operation of the transit system." [SERB op., p. 4]

8. The agreement between the City and T.M.H. provides that all revenue received from the transit system "shall be and remain the absolute property of the City and the treatment of such revenue, including the banking thereof, and the accounting therefore, shall be as directed by the City." [SERB op., p. 4]

As a result of these facts, SERB concluded that

> it is unnecessary to look any further than the four corners of the contract to conclude that the City, and not T.M.H., is responsible for the payment of the employees' wages and that the functions provided by T.M.H.

in carrying out such are only ministerial in nature.

SERB op., p. 4.

In making its decision, SERB rejected T.M.H. and the City's arguments by noting that

> the conclusion that T.M.H. is the employer in this case because it does the paperwork for deducting taxes and issues paychecks from an account bearing its name (one established with City revenue) is in parity with an argument that because a secretary or payroll clerk performs these same tasks, that person is thereby the employer.

SERB op., p. 4.

REASONS FOR DENYING THE WRIT

A. THIS CASE INVOLVES AN ISSUE OF STATE STATUTORY INTERPRETATION. THESE EMPLOYEES ARE DEFINED UNDER STATE LAW, OHIO REVISED CODE §4117.01(c), AS PUBLIC EMPLOYEES. BECAUSE THESE ARE PUBLIC EMPLOYEES, FEDERAL LABOR LAW AND *GARNER* PREEMPTION DO NOT APPLY. 29 U.S.C. §152(2) EXEMPTS PUBLIC EMPLOYEES FROM THE PROVISIONS OF THE FEDERAL LABOR LAW.

This case solely involves an issue of state statutory interpretation. This case does not involve a federal issue.

This case involves the **state law definition** of "public employee" contained in Ohio Revised Code §4117.01(c). The Ohio Supreme Court found that these employees met the state definition of public employee. The Ohio Supreme Court found that these employees are employees of the City of Hamilton.

The City in its request for review by this Court is doing nothing more than attempting to have this Court reinterpret

the Ohio Supreme Court's interpretation of the Ohio legislature's statutory definition of public employee.

Because these employees are employees of the City of Hamilton, they are explicitly exempted from the provisions of federal labor law under 29 U.S.C. § 152(2). Therefore, no federal preemption issue exists.

Employees, such as those involved in the present case, of an Employer such as the City which "is not an employer under the [NLRA] . . . cannot qualify" as a labor organization under the terms of the NLRA. *Local Div. 589 v. Amalgamated Trans. U.* (USDC D. Mass. 1969), 295 F.Supp. 630, 632. Therefore, the NLRB would have no interest in this matter.

As a result of this, there could be no basis for finding preemption.

When a state characterizes the employment relationship as involving a public employer, "[b]ased upon that characterization . . . this Court must hold that the [entity involved] is a political subdivision of a State and is *not*, therefore, an `employer'" for purposes of federal labor law. *Division 1287, Amalgamated Trans. U. v. Kansas City Area Transp.*, 485 F.Supp. 856, 859 (W.D. Mo. 1980).

Similarly in the present case the Ohio Supreme Court has found under Ohio Revised Code §4117.01(c) that these Employees are employees of the City. As a result of this characterization under state law, it is clear that these employees are public employees and the City is not an employer under the provisions of 29 U.S.C. 152(2).

Neither *Garner v. Teamsters Local Union*, 346 U.S. 485 (1953), nor *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1953), apply to the present case because *Garmon* pre-emption

> is designed to prevent conflict between, on the one hand, state and local regulation and, on the other, Congress' "integrated scheme of regulation," embodied in §§ 7 and 8 of the NLRA . . .
>
> *Building & Trades Council v. Assoc. Builders and Contractors of Mass./R.I.*, 113 S.Ct. 1190, 1195 (1993).

This case does not implicate the integrated scheme of regulation because these employees are employees of a political subdivision (*i.e.* the City), and therefore are exempt from the application of the NLRA by the terms of 29 U.S.C. 152(2).

There is no intrusion on federal labor law in this case because federal

labor law exempts the state and its political subdivisions.

Because, as the Ohio Supreme Court has held, these employees are public employees the NLRA (by definition) does not apply. Therefore, no federal preemption issue exists.

B. FEDERAL PREEMPTION DOES NOT APPLY BECAUSE THE CASE DOES NOT "ARGUABLY" COVER PROTECTED MATTERS. THE OHIO SUPREME COURT PROPERLY DETERMINED THAT THE CITY OF HAMILTON IS THE EMPLOYER AND THEREFORE THESE EMPLOYEES ARE PUBLIC EMPLOYEES.

As discussed above this matter is not one which involves a federal issue, because these employees are employees of the City which is exempt from the NLRA pursuant to 29 U.S.C. 152(2).

As discussed above, because this matter involves an employer and employees who are exempt from application of the NLRA, *Garmon* pre-emption does not apply.

However, there is another reason why *Garmon* pre-emption would not apply. *Garmon* pre-emption is inappropriate because this matter is not one which is "arguably" protected:

> The **precondition for pre-emption, that the conduct be "arguably" protected or prohibited,** is not without substance. It is not satisfied by a conclusory assertion of pre-emption . . . If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the Board.
>
> *Int'l Longshoremen's Assn. v. Davis*, 476 U.S. 380, 394-395 (1986).
>
> [Emphasis added.]

The Ohio Supreme Court correctly applied the "right of control" test to determine that the City, not T.M.H. was the employer. Therefore, this is not a

matter in which the NLRB could legally decide in the City's favor.

Under the right of control test, the question is:

> ...whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative.
>
> *National Transportation Service*, 240 NLRB (1979) at 565.

The facts amply demonstrate that the City of Hamilton, not T.M.H., has the control necessary for meaningful bargaining. The City funds the Transit System, pays the Transit employees, owns the Transit equipment, receives all fares and makes all the important decisions. All work performed by T.M.H. is done under the guidance of the City.

A.T.E./T.M.H. serves as an agent in carrying out the City policies and in

paying the Transit personnel with City funds.

The true employer of the employees in this case is the City, as found by the Ohio Supreme Court.

The NLRB's decision in *Res Care, Inc.*, 280 NLRB No. 78, demonstrates that this case is one where the true Employer is the City, not T.M.H., and therefore the NLRB would lack jurisdiction. In *Res Care*, the NLRB found the governmental entity was the true employer because:

> The DOL provisions under which Res-Care's wages and benefits are set establish to our satisfaction that DOL controls the primary economic terms and conditions of employment. ...In every sense, it is DOL, not Res Care, which retains ultimate discretion for setting wage and benefit levels on the job corps center, and thus effectively precludes Res-Care from engaging in meaningful collective bargaining.
>
> *Res Care* at 673

Here, the facts demonstrate that the City is like the governmental entity in *Res Care*, and no meaningful bargaining can be had between T.M.H. and the Union because of the City's control over "the primary terms and conditions of employment."

The Union cannot bargain meaningfully with T.M.H. because the City provides T.M.H.'s funds. T.M.H. cannot agree to any wage or benefit increases without the City's approval because the City provides **all** of T.M.H.'s funding. T.M.H. has no independent funding; it only has funds supplied by the City.

Because the funds are provided by the City, T.M.H.

> is performing a management service for an exempt government agency which exercises a substantial degree of

> control over the performance of its services which are intimately related to the city's municipal functions.
>
> *Mississippi City Lines, Division of American Transit Corp.*, 223 NLRB 11

In *Mississippi City Lines*, the NLRB held that the political subdivision exemption applied to a bus system where the management company was reimbursed for all costs which exceeded the revenues at the end of the month.

The present case is even more clearly one where this exception would apply than *Mississippi City Lines*, because the City of Hamilton receives all revenue, and pays all costs incurred by T.M.H.

For that reason, the City's argument on this issue is one which has been "authoritatively rejected" by the NLRB. Therefore this case is not one where the matter is "arguably protected" and *Garmon*

pre-emption does not apply. *Int'l Longshoremen* at 395.

C. THERE IS NO IMPLICATION ON FEDERAL LABOR LAW BY THE OHIO SUPREME COURT'S DECISION IN THE PRESENT CASE THAT THESE EMPLOYEES ARE PUBLIC EMPLOYEES.

As discussed above, the Ohio Supreme Court's determination in this case that these Employees were employees of the City was correct. Therefore, there would be no implication of federal law by application of the Ohio Statutory definition of "public employee."

This is demonstrated both by the facts and cases discussed above, as well as for the following reasons.

Because the City totally controls T.M.H.'s funding, T.M.H. lacks the discretion necessary for it to meaningfully bargain with the Union.

The NLRB has emphasized the importance of economic control in

determining the Employer. In *PHP Healthcare*, 285 NLRB No. 25, the non-governmental entity had "control over hiring, training, discipline, promotion standards, and grievances," but the NLRB held that the governmental entity was the true Employer because:

> **if an employer does not have the final say on the entire package of employee compensation**, i.e., wages and fringe benefits, **meaningful bargaining is not possible.**
>
> *PHP Healthcare* at 184.
>
> [Emphasis added].

In *Southwest Ambulance*, the NLRB found the government entity had the "right of control" even though the contracting agent "almost exclusively control[ed] its personnel policies and procedures." *Southwest Ambulance* 131 LRRM 1491, 1492.

The reason for this decision was "the

level of wages and benefits is set by the county in approving the budget on which the contract price is based." *Southwest Ambulance* 131 LRRM 1491, 1492.

The contractor in *Southwest Ambulance* had much more control over policies and procedures than T.M.H., yet the NLRB found that the governmental entity had the right of control because the contractor had

> **no demonstrated source of income other than the set-price contract with the county. Accordingly, it has no means of covering the cost of wages and benefits above the level set in its contract with the county.**
>
> *Southwest Ambulance* 131 LRRM 1491, 1492.
>
> (Emphasis added.)

Similarly, T.M.H. has no source of income other than that provided by the City. Because of this, T.M.H. lacks the ability to meaningfully bargain with the

Union. It cannot provide wages and benefits beyond what the City provides.

The NLRB noted in *Southwest Ambulance* that this lack of economic control **alone** was enough to establish that the true employer was the government entity. The board stated:

> Like the exempt entities in *PHP Healthcare* and in *Res-Care*, the county of San Diego effectively controls all of the economic terms and conditions of employment although the county exerts almost no control over the Employer's personnel policies and procedures. We find the *PHP Healthcare* controls the instant case.
>
> *Southwest Ambulance* 131 LRRM 1491, 1492

Because there would be no basis for finding anything other than that the City is the true employer under Federal labor law, there is no basis for *Garmon* pre-emption.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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